

Christopher Calfee, Deputy Secretary and General Counsel  
California Natural Resources Agency  
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Sacramento, CA 95814

Dear Chris

Thank you for the opportunity to comment on the proposed CEQA Guidelines amendments and additions. Regularly updating the Guidelines to reflect current statutes and case law is extremely helpful to practitioners and the public. For the most part, I think that the proposed changes are well-written and on point. The Natural Resources Agency and Office of Planning and Research have done a commendable job in identifying key areas of the Guidelines that are in need of updating and proposing useful changes.

However, I do have some suggestions for revisions that would clarify the proposed language and avoid inadvertent misinterpretations by practitioners. These comments are my own and do not reflect the opinions of my employer. My comments and suggested revision language follow.

Sincerely,

A handwritten signature in black ink, reading "Antero Rivasplata". The signature is fluid and cursive, with the first name "Antero" being more prominent and the last name "Rivasplata" following in a similar style.

Antero Rivasplata, AICP  
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## Comments on the proposed 2018 CEQA Guidelines amendments

The proposed guidelines language is presented below in **bold** type. My suggested deletions and revisions are shown in strike-out and underlined, non-bold text.

### Section 15004.

15004(b)(2)(A): the added language could easily be misinterpreted as allowing deferral of CEQA analysis, which is in opposition to case law. I suggest the following replacement language, generally reflective of the holding in *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4<sup>th</sup> 540:

**... except that agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has committed to completing CEQA compliance prior to final acquisition**~~conditioned the agency's future use of the site on CEQA compliance.~~

15004(b)(4): for clarity, I suggest adding the following:

(D) Not restrict the lead agency from denying the project.

### Section 15064.

15064(b)(2): for clarity, the added language should use the term “fair argument” rather than “substantial evidence indicating.” I suggest revising the text of the final sentence as follows: **“Compliance with the threshold does not relieve a lead agency of the obligation to consider a fair argument ~~substantial evidence~~ indicating that the project's environmental effect may still be significant.”** This confirms that the fair argument applies and avoids confusion among practitioners.

### Section 15064.3.

15064.3(b)(1): the text of this subsection establishes a general presumption for projects within ½ mile of specified transit opportunities. That appears to be undercut by the provisions of the Technical Advisory. Specifically, the advisory creates a numeric threshold for residential and commercial projects of 15% below existing VMT per capita. This needs to be clarified in the Technical Advisory so it is in agreement with the Guideline.

Also, the Technical Advisory's threshold of 15% below existing VMT unnecessarily burdens projects where existing VMT is low, such as in dense central cities. It may actually work as a disincentive to projects in those areas.

15064.3(b)(2): arguably, transportation (i.e., road) projects are the most important single type of project resulting in long-term VMT increases. Similarly, mitigating these increases for road projects can have a greater effect on VMT and the associated emissions of greenhouse gases (GHGs) than mitigation of small, individual development projects. Agencies should not be given the discretion to use a metric other than VMT for transportation projects. Using another metric avoids the need to consider induced VMT, creating a large loophole in the GHG emissions reduction objective of SB 743.

15064.3(b)(3): this implies strongly that qualitative analysis is only suitable when existing models/methods are not available. This will lead to arguments over whether existing models/methods

would apply to a project, particularly as quantitative models become more available. I suggest the following revision:

**(3) Qualitative Analysis. ~~If existing models or methods are not available to estimate the vehicle miles traveled for the particular project being considered, a~~ lead agency may analyze the project's vehicle miles traveled qualitatively. Such a qualitative analysis would evaluate factors such as the availability of transit, proximity to other destinations, typical VMT for similar projects, etc. For many projects, a qualitative analysis of construction traffic may be appropriate.**

Section 15125.

15125(a): I recommend revising the proposed new sentence to simplify it.

**The purpose of this requirement is to give the public and decision makers ~~the most accurate and understandable~~ information about picture practically possible of the project's likely near-term and long-term impacts to allow them to make an informed decision.**

15125(a)(1) and (2): the discussion of using a historic baseline (covered by the Supreme Court in *Communities for a Better Environment v. South Coast Air Quality Management District*) is being conflated with the *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* decision on the use of a future baseline. These subdivisions need to be reworked to correctly express the Supreme Court's *Smart Rail* and *Communities for a Better Environment* holdings. Historic baseline was addressed in *Communities for a Better Environment* and does not require special findings. I recommend the following revisions:

**(1) Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. Where existing conditions change or fluctuate over time, ~~and where necessary to provide the most accurate picture practically possible of the project's impacts,~~ a lead agency may define existing conditions by referencing historic conditions, average conditions over time, or conditions expected when the project becomes operational, that are supported with substantial evidence. ~~In addition to existing conditions, a lead agency may also use baselines consisting of projected future conditions that are supported by reliable projections based on substantial evidence in the record.~~**

**(2) A lead agency may use ~~either a historic conditions baseline or a projected future conditions baseline~~ as the sole baseline for analysis only if it demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public. Use of projected future conditions as the only baseline must be supported by reliable projections based on substantial evidence in the record. The lead agency must adopt a finding based in substantial evidence to support its use of a future conditions baseline.**

Section 15126.2.

15126.2(a): This doesn't seem to reflect the Supreme Court's *CBIA v. BAAQMD* ruling in that it may still be interpreted to require review of impacts of the environment on the project. I recommend the following revisions to the last sentence:

For example, ~~an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there. Similarly,~~ the EIR should evaluate any potentially significant **direct, indirect or cumulative environmental** impacts of locating development in **other** areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas), **including both short-term and long-term conditions**, when the development would exacerbate the risk. ~~as The conditions may be identified in authoritative hazard maps, risk assessments or in land use plans, addressing such hazards areas.~~

15126.2(b) Energy Impacts: there's little statutory basis for this new subsection and it should be deleted. Energy is only covered in one subdivision of the statute, and then only in passing. Pub Res Code Section 21100(b)(3) states that an EIR must include: "(3) Mitigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy."

That mere mention does not support the extensive requirement set out in the proposed Guideline, nor does it continue to support retention of Appendix F.

Section 21100(b)(3) was enacted in the mid-1970s, before the adoption of energy conservation measures in the California Building Codes, water conservation measures, and other regulatory actions that greatly reduce energy use in California. The Initial Statement of Reasons ignores the broad regulatory scope of California's energy conservation efforts and how that greatly reduces the need to consider energy consumption on a case-by-case basis. Conservation efforts include not only Title 24 building code standards and Title 20 appliance efficiency program for energy conservation in buildings, which are tightened tri-annually, but also state requirements for local water efficient landscape ordinances, general conservation by water providers (e.g., Water Conservation Act of 2009 requiring a 20% reduction in per capita urban water use by 2020), the push for increased reliance on renewable energy embodied in the Renewables Portfolio Standard, and other energy conserving programs and regulations that apply to development, regardless of whether a project is subject to CEQA. The following goals for the development of zero net energy (ZNE) buildings set out in the California Public Utilities Commission's *California Energy Efficiency Strategic Plan* are a good example of California's energy conservation future:

- All new residential construction will be ZNE by 2020.
- All new commercial construction will be ZNE by 2030
- 50% of commercial buildings will be retrofit to ZNE by 2030
- 50% of new major renovations of state buildings will be ZNE by 2025, and 100% by 2025

Rather than continuing the outdated assumption that California does not have a nation-leading, energy-conserving regulatory scheme, the Guidelines should recognize that new development is consistently

less energy intensive than existing conditions. The regulatory scheme in 2018 is different from the 1970s when Section 21100 was enacted. Consideration of the “wasteful, inefficient, and unnecessary consumption of energy” should be updated to match the current and future results of that scheme in avoiding these impacts.

The primary source of “excessive” energy use is transportation. Although transportation is increasingly efficient on a per vehicle level, continuing increases in VMT offset those efficiencies. Please consider limiting these requirements to that sector. Waste, inefficiency, or unnecessary consumption are not defined in the Guidelines. Providing such definitions would be very useful for purposes of mitigating energy use related to transportation, and could be linked to the goal of VMT reduction.

Also, I suggest that the related Guidelines Appendix F is no longer necessary and should be repealed. The initial statement of reasons notes that this appendix dates to the mid-1970s. As I’ve explained above, California’s regulatory scheme is much changed since the adoption of Appendix F. Subsection (a)(1) of Section 15126.4 “Consideration and Discussion of Mitigation Measures proposed to Minimize Environmental Effects” covers the language in Section 21100(b)(3) on energy conservation and should suffice to meet CEQA’s requirements.

Section 15155.

This section could be improved by adding a statement clarifying that while an EIR must disclose the availability of water to serve a proposed project, it is not required to ensure that water is available. That is the holding in several court decisions, including *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4<sup>th</sup> 260, *Watsonville Pilots Assoc. v. City of Watsonville* (2010) 183 Cal.App.4<sup>th</sup> 1059, and *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412. Here is suggested language:

(g): The purpose of the water supply assessment is to disclose the availability of water supply in order to promote informed decisions. However, the CEQA document is not required to ensure that water will be available to the project.

Section 15168.

15168(c)(3): the definition of “within the scope” should be revised to clarify that the focus is on the scope of the project originally approved under the Program EIR. Recommend revising the last sentence as follows:

**Factors that an agency may consider in making that determination include, but are not limited to, consistency of the later activity with the type of allowable land use, overall planned density and building intensity, geographic area analyzed for environmental impacts, and description of covered infrastructure, as described presented in the project description or elsewhere in the program EIR.**

Section 15357.

The proposed revision to the definition of “discretionary project” should be made to the definition of “ministerial project” instead. The case law on this point has been over ministerial projects, not discretionary ones.

I recommend the following: No change to Section 15357. Make the following revision to Section 15369, based on *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5<sup>th</sup> 11, *Sierra Club v. Napa County Board of*

*Supervisors* (2012) 205 Cal.App.4<sup>th</sup> 162, and *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4<sup>th</sup> 924:

**Section 15369. MINISTERIAL**

“Ministerial” describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee.

The existence of discretion is irrelevant if it does not confer the ability to mitigate any potential environmental impacts in a meaningful way. A decision is ministerial when the public official may have some limited discretion over the requirements of the permit, but that discretion did not allow the official to mitigate potential environmental impacts to any meaningful degree.